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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE C. BELL,

Defendant and Appellant.

A154910

(San Francisco City and County
Super. Ct. No. 17017526)

Eugene Bell appeals after a jury convicted him of attempted second degree robbery. (Pen. Code, §§ 211, 664.)¹ Bell contends his conviction should be reversed because it was legally impossible for him to be guilty of *attempted* robbery (although he admits he committed robbery). He also argues the trial court should have instructed the jury on a lesser included defense, petty theft. We affirm.

BACKGROUND

A.

On November 27, 2017, Isabella Marin was working as a barista at a café in San Francisco. Bell approached the counter, took the money out of the tip jar, and fled. As Bell ran out of the store, Marin grabbed the empty tip jar and threw it at him. She then chased Bell down the sidewalk, shouting that he stole money. A customer followed Marin out of the café because he was worried about her safety.

¹ Undesignated statutory references are to the Penal Code.

As Marin caught up to Bell, he turned around and hit her twice in the face. His first punch split Marin's lip open. His second punch landed on her eye, knocking her glasses off her face. Marin began "seeing stars." Bell grabbed her by the shoulders and repeatedly slammed her against the wall, bruising her head and the left side of her body. Marin stumbled and caught herself with her hands. Marin explained she could not fight back because she was "overpowered" and "just waited for it to stop."

By the time the customer caught up to Marin and Bell, he observed Bell already "swinging his arms to get rid of [Marin], . . . and he was forcefully trying to get away." He saw Marin fall, and he and another person held Bell until the police arrived.

Bell admitted to the police that he stole the tips to buy methadone. He said "the girl" saw him take the tips and threw a can at him as he left the store, which hit him in the head. Bell walked away quickly, but he could not run because he had a bad leg. The same "girl" chased after him and punched him in the face. When she would not stop hitting him, he hit back to get her off him.

B.

The People charged Bell with attempted robbery but, curiously, not robbery. In her closing argument, the prosecutor explained to the jury, "you might be wondering why there's an attempt charge here And my honest answer is I don't know. . . . I don't make the charging decisions in my office, and what you've been given to decide on is attempted robbery, but you have a completed robbery here."

The court declined the People's request to amend the information to charge robbery, in conformance with the evidence, because it would have been unfair to Bell, who might have defended the case differently. It also denied Bell's request to instruct the jury on petty theft as a lesser included offense of attempted robbery. The court gave standard instructions on attempt crimes, including the instruction that "Mr. Bell may be guilty of attempt even if you conclude that the second degree robbery was actually completed." (CALCRIM No. 460.) It also instructed the jury on self-defense. (CALCRIM Nos. 3470, 3472.)

The jury convicted Bell of attempted second degree robbery. The court sentenced Bell to three years' probation with a six-month jail condition that would be stayed unless he was arrested.

DISCUSSION

A.

Bell admits he committed robbery but argues that, under the facts of this case, it is legally impossible for him to be convicted of attempted robbery. We disagree.

Robbery has six elements: (1) a defendant must take property that was not his own; (2) the property must have been in the possession of another person; (3) the property must have been taken from the other person's immediate presence; (4) the property must have been taken against the other's person's will; (5) the defendant must have used force or fear to take the property; and (6) the defendant must have had the intent to permanently deprive the person of the property. (CALCRIM No. 1600.)

This case is a so-called *Estes* robbery, in which a defendant does not use force when he initially takes the property but does use force later to retain the property from someone attempting to recover it. (*People v. Estes* (1983) 147 Cal.App.3d 23, 27–29 (*Estes*).) In *Estes*, the defendant took an item from a department store. He did not use force or fear until a guard confronted him outside the store, at which point he brandished a knife. (*Id.* at p. 26.) Likewise, Bell used force only when confronted by Marin as he tried to escape with the money.

Bell argues it is legally impossible to commit an attempted (as opposed to a completed) *Estes* robbery. Attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission. (§§ 21a, 211.) It is legally impossible to attempt an *Estes* robbery, Bell says, because “there is no mental construct where the thief would intend to take the property by force before that force is applied,” and, once the force is applied, the robbery is complete.

Bell's conundrum is solved by section 663: “Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court,

in its discretion, discharges the jury and directs such person to be tried for such crime.” The statute is designed to address precisely the scenario here—i.e., the defendant is charged only with an attempted crime when, in fact, the evidence shows that he completed it. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 610.) The state may prove Bell attempted the robbery or completed it—either way, it may convict him of attempted robbery. (*Ibid*; *People v. Parrish* (1985) 170 Cal.App.3d 336, 342–343 [under § 663, “the state is not barred from imposing punishment for an attempt merely because the crime has been completed”].)

The fact Bell committed an *Estes* robbery is irrelevant. Robbery is robbery. (§ 211; *People v. Gomez* (2008) 43 Cal.4th 249, 259–261 [*Estes* does not expand the definition of robbery under § 211].) Bell admits he committed a robbery. He therefore can be convicted of attempted robbery. (§ 663.) We do not know why the People charged Bell only with attempted robbery. But given that Bell admits he committed a more serious crime, he should perhaps consider himself fortunate.

B.

We reject Bell’s argument that the trial court violated his federal and state due process rights by refusing to instruct the jury on the lesser included offense of petty theft.

1.

“[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.” (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) A trial court must instruct the jury on any lesser offense if there is substantial evidence that only the lesser crime was committed. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) “ ‘[T]he rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.’ ” (*Ibid.*)

2.

Generally, theft is not a lesser included offense of attempted robbery. Bell is correct that theft *is* a lesser included offense of *robbery*. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) Mere theft becomes robbery if a person, having taken property

without using fear or force, later uses fear or force to retain the property. (*People v. Gomez, supra*, 43 Cal.4th at p. 254.) But *attempted* robbery only requires the specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission. (§§ 21a, 211; *People v. Dillon* (1983) 34 Cal.3d 441, 455–456.) It does not require the completion of any element of robbery, including theft. (*People v. Lindberg* (2008) 45 Cal.4th 1, 28.) Thus, because a person can commit attempted robbery without committing theft, theft is not a lesser included offense of robbery. (See *People v. Lopez, supra*, 19 Cal.4th at p. 288.)

But Bell argues it is not so simple here because the parties agree that a theft—indeed a robbery—was completed. Had the jury credited his self-defense claim, Bell contends, it would have negated the element of force or fear, leaving just the theft. Thus, the court had a duty to instruct the jury on petty theft to avoid a scenario where the jury had an all-or-nothing choice between convicting Bell of robbery or acquitting him. (*People v. Smith, supra*, 57 Cal.4th at p. 239.)

We need not reach this issue because Bell did not have viable self-defense claim. Self-defense is unavailable to a person who responds to a threat with an unreasonable amount of force. (*People v. Beyea* (1974) 38 Cal.App.3d 176, 190, disapproved on other grounds by *People v. Blacksher* (2011) 52 Cal.4th 769, 808; CALCRIM No. 3470.) Even crediting Bell’s implausible statement that Marin struck him first, the evidence is overwhelming that he used an unreasonable amount of force to defend himself, punching her in the face twice and repeatedly throwing her against a wall, leaving Marin with injuries to her lip, eye, head, and the left side of her body. Without a viable self-defense claim, a reasonable jury could not conclude that Bell is guilty only of petty theft, not robbery. Accordingly, the court was not required to instruct the jury on petty theft. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162.)

DISPOSITION

The judgment is affirmed.

BURNS, J.

WE CONCUR:

JONES, P. J.

SIMONS, J.

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